

Office of Chief Counsel
Internal Revenue Service

memorandum

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DRJojola

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to: Chief, Quality Measurement Branch, Los Angeles District
Attn: Linda Cuneo, Statute Coordinator, Stop 4031

from: District Counsel, Los Angeles District, Los Angeles

subject: [REDACTED] and [REDACTED]

ISSUE

Whether the time to assess the determined income tax liability against [REDACTED] is barred for the taxable year [REDACTED].

SHORT ANSWER

The evidence reflects that the Commissioner failed to secure a written power of attorney from [REDACTED]'s agent, [REDACTED], prior to accepting the relevant statute extension. Nevertheless, because [REDACTED] had the authority to act on [REDACTED]'s behalf, it is Counsel's opinion that [REDACTED]'s act of extending the relevant statute of limitation with regard to [REDACTED] is valid.

STATEMENT OF THE FACTS

[REDACTED] and [REDACTED], hereinafter Taxpayers, filed a joint individual income tax return with the Commissioner for the taxable year [REDACTED]. The Commissioner's records reflect that the Taxpayers' [REDACTED] joint individual return was posted as being received by the Commissioner on [REDACTED]. The Taxpayers' [REDACTED] joint return reflects that the paid preparer of such return is [REDACTED], hereinafter [REDACTED]. According to [REDACTED], he has prepared the Taxpayers' joint individual income tax returns since [REDACTED].

In the immediate case, [REDACTED] became aware that [REDACTED]'s corporate medical practice [REDACTED] had been selected for examination. After receiving such notice, [REDACTED] secured a written power of attorney, Form 2848, in order to allow him to represent the corporate medical practice, hereinafter Practice, before the Commissioner. [REDACTED]'s services were solicited by [REDACTED]. The Commissioner's computer records reflect that the Practice's [REDACTED] and [REDACTED] taxable years were identified for examination in [REDACTED] and [REDACTED], respectively. According to [REDACTED], he has prepared the Practice's corporate income tax returns since [REDACTED].

The power of attorney submitted to the Commissioner on behalf of the Practice reflects that [REDACTED]'s and [REDACTED]'s signatures are dated [REDACTED], and [REDACTED], respectively. The power of attorney provided to Counsel does not contain the date such power of attorney was received. Counsel has been unable to ascertain from the Commissioner's computer records the date such power of attorney was submitted.

[REDACTED] has represented to Counsel that the scope of the examination originally focused solely upon corporate level adjustments. [REDACTED] informed Counsel that during this period of the examination, he discussed the progress of the examination with [REDACTED]. However, it is [REDACTED]'s recollection that [REDACTED] was aware of the ongoing examination of the Practice.

Although [REDACTED] could not specifically recall calendar dates, he informed Counsel that at some point in the examination, the issue arose as to whether expenses paid by the Practice should be deemed to be constructive dividends paid to the Taxpayers. [REDACTED] informed Counsel that after the constructive dividend issue was raised, he began meeting with both [REDACTED] to discuss the status of the examination. [REDACTED] recalls that he personally met with [REDACTED] at least twice during the course of the examination to discuss the status of the individual examination items. In addition, [REDACTED] informed Counsel that he discussed the status of the examination with [REDACTED] by telephone on at least ten occasions. It is [REDACTED]'s recollection that [REDACTED] was contemporaneously aware of and approved of his representation before the Commissioner. [REDACTED] informed Counsel that prior to agreeing to the relevant Revenue Agent's Report [Form 4549] on behalf of the Taxpayers, he met with both [REDACTED] and [REDACTED] and secured their consent.

The files provided to Counsel are notably absent of information regarding the corporate and individual examinations that were performed. Of particular concern to Counsel is that the relevant work papers, correspondence and proposed adjustments do not clearly reflect the date the relevant action or contact took place between the Examination Division and the Taxpayers.

LEGAL ANALYSIS

In the immediate case, [REDACTED] has not raised a statute of limitation defense. Nevertheless, the Commissioner has made a preliminary finding that the relevant assessment statute for the taxable year [REDACTED] has expired with respect to [REDACTED], hereinafter [REDACTED]. Thus for purposes of this memorandum, Counsel will proceed on the basis that [REDACTED] has affirmatively raised a statute of limitation defense to the determined deficiency for the taxable year [REDACTED].

Section 6501(a) sets forth the general rule that "the amount of any [income tax] * * * shall be assessed within 3 years after the return was filed." An exception to the general rule is found in Section 6501(c)(4), which provides:

Extension by agreement. Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, * * *, both the Secretary or his delegate and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

In the event the matter was to proceed to litigation, [REDACTED] would be required to make a prima facie case that the assessment statute was barred by proving that the assessment was made more than three years after the filing date of [REDACTED]'s [REDACTED] individual return. See Rule 142(a); Adler v. Commissioner, 85 T.C. 535, 540 (1985); Lyon v. Commissioner, 68 T.C.M. 224, 225-226; Ryan v. Commissioner, 61 T.C.M. 1801, 1802; Lefebvre v. Commissioner, 47 T.C.M. 1572, 1574 affd. 758 F.2d 1340 (9th Cir. 1985). If [REDACTED] was successful in establishing a prima facie case, the Commissioner would be required to go forward with countervailing proof showing that for some reason the period of limitation for assessment had not expired. Adler v. Commissioner,

supra at 540; Lyon v. Commissioner, supra at 225-226; Ryan v. Commissioner, supra at 1802; Lefebvre v. Commissioner, supra at 1574. A taxpayer's burden is discharged by introducing the relevant return into evidence. Robinson v. Commissioner, 57 T.C. 735 (1972); Lefebvre v. Commissioner, supra at 1574. The Commissioner's burden is discharged by introducing into evidence a consent, valid on its face, that extends the period of limitation for assessment. Concrete Engineering Co. v. Commissioner, 19 B.T.A. 212 (1930), affd. 58 F.2d 566 (8th Cir. 1932); Adler v. Commissioner, supra at 540; Lyon v. Commissioner, supra at 225-226; Ryan v. Commissioner, supra at 1802-1803; Lefebvre v. Commissioner, supra at 1574. If the Commissioner introduces a timely consent that is valid on its face, and the taxpayer asserts that such consent was ineffective, then the taxpayer is required to prove the invalidity of the consent. Crown Willamette Paper Co. v. McLaughlin, 81 F.2d 365 (9th Cir. 1936); Concrete Engineering Co. v. Commissioner, supra; Amesbury Apartments, Ltd. v. Commissioner, 95 T.C. 227, 240-241 (1990); Lyon v. Commissioner, supra at 225-226; Ryan v. Commissioner, supra at 1802-1803; Lefebvre v. Commissioner, supra at 1574.

A. Consent to Assess

The Commissioner's records reflect that the Taxpayers' joint individual income tax return for the taxable year [REDACTED] was deemed to be filed with the Commissioner on [REDACTED]. Consequently, the general three year assessment statute expired on [REDACTED]. The evidence establishes that [REDACTED], on behalf of the Taxpayers, signed the Revenue Agent's Report [Form 4549] consenting to the assessment of the determined deficiency for the taxable year [REDACTED] on or about [REDACTED]. Because the consent to assess was secured more than three years following the filing of the relevant return, it is Counsel's opinion that the taxpayers could establish a prima facie case that the period of limitation for assessment had expired. Consequently, in order to rebut the Taxpayers' prima facie case, the Commissioner would be required to introduce a timely consent extending the statute beyond [REDACTED].

B. Consent to Extend

The Commissioner's files reflect that the Examination Division secured a consent to extend the time to assess tax [Form 872] on behalf of [REDACTED] and [REDACTED] for the taxable year [REDACTED]. The consent within the Commissioner's file on its face properly identifies:

1. [REDACTED] and [REDACTED];
2. the taxable year [REDACTED] and type of tax to which the consent is applicable;
3. bears the original signature of "[REDACTED]" in the space for the signature of the taxpayer's representative;
4. is consented to by an authorized IRS representative; and
5. was executed prior to the expiration of the applicable period of limitation.

Thus, as is required, it is Counsel's opinion that the Commissioner could meet the necessary requirement of introducing a consent extending the period for assessment that is valid on its face. Lyon v. Commissioner, supra at 226; Ryan v. Commissioner, supra at 1803; Lefebvre v. Commissioner, supra at 1575. When the Commissioner introduces a consent regular on its face and in accordance with the law, the Tax Court will presume that the parties who signed the consent acted within their scope of authority. Concrete Engineering Co. v. Commissioner, supra at 221; Ryan v. Commissioner, supra at 1803. It is Counsel's opinion that, being able to carry the necessary burden, [REDACTED] would be required to prove that the consent is invalid. Lyon v. Commissioner, supra at 226; Ryan v. Commissioner, supra at 1803; Lefebvre v. Commissioner, supra at 1575.

C. Validity of Consent to Extend

In order to prove that the consent is invalid, Counsel envisions that [REDACTED] would point to the fact that the power of attorney appointing [REDACTED] as [REDACTED]'s agent is dated subsequent to the consent. Consequently, [REDACTED] would likely argue that such statute extension is not effective to bind [REDACTED]. In summary, [REDACTED]'s attack is likely to be premised on the theory that [REDACTED] was not authorized to execute the consent on [REDACTED]'s behalf.

It is Counsel's opinion that the Commissioner's failure to secure a timely power of attorney from [REDACTED] is not fatal. The acceptance by the Commissioner of a consent extending the period of limitation which was executed by a taxpayer's agent merely constitutes a waiver by the Commissioner of one of his own requirements. Estate of Maceo v. Commissioner, T.C. Memo. 1964-46; Lyon v. Commissioner, supra at 226; Ryan v. Commissioner, supra at

1803. There is nothing in the law or the accompanying regulation calculated to indicate that the Commissioner is to be placed in a strait-jacket which, by iron rule, is to remove all flexibility in administration. Id. The provisions of Section 276(b) [the predecessor of section 6501(c)(4)], supra, and the interpretative regulations are directory or advisory, not mandatory. See Holbrook v. United States, 284 F.2d 747 (9th Cir. 1960); Estate of Maceo v. Commissioner, supra at 375-376; Lyon v. Commissioner, supra at 226; Ryan v. Commissioner, supra at 1803.

Actual Authority

Thus, the fundamental question which must be answered is whether [REDACTED] had the authority to sign the consent on behalf of [REDACTED]. The general rule set forth in 1 Restatement, Agency 2d, Sec. 26 (1957), provides that the "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." The extent of an agent's authority is a factual question to be decided on the basis of all the facts and circumstances revealed by the record. Adams v. Commissioner, 85 T.C. 359, 369-372 (1985); Kraasch v. Commissioner, 70 T.C. 623, 627-629 (1978); Lyon v. Commissioner, supra at 226. Unless otherwise provided by statute, a written authorization is not necessary for the execution of a writing. 1 Restatement, Agency 2d, Sec. 30; Lyon v. Commissioner, supra.

As previously discussed, the scope of the examination originally focused solely upon corporate level adjustments. During the preliminary stages of the examination, [REDACTED]'s representation appears to have been limited to the Practice and [REDACTED], in her individual capacity. However, when the scope of the examination expanded, so did [REDACTED]'s representation.

After the constructive dividend issue was raised, [REDACTED] began meeting with both [REDACTED] and [REDACTED] to discuss the status of the examination. [REDACTED] informed Counsel that he personally met with [REDACTED] at least twice during the course of the examination to discuss the status of the individual examination items. In addition, [REDACTED] recalls discussing the status of the examination with [REDACTED] by telephone on at least ten occasions. Although [REDACTED] has no specific recollection of calendar dates, his recollection is that [REDACTED] was contemporaneously aware of and approved of his representation before the Commissioner. Accepting [REDACTED]'s statements as accurate, it is Counsel's opinion that the evidence is sufficient to establish that [REDACTED] authorized [REDACTED] to handle [REDACTED]'s individual tax matters for the taxable year [REDACTED].

Ratification

Furthermore, it is well established that a waiver which is itself defective may be ratified by subsequent actions of a taxpayer. Kraasch v. Commissioner, supra at 628; Ryan v. Commissioner, supra at 1804. Thus even if [REDACTED] acted without authority when he executed the consent form on [REDACTED]'s behalf, a credible argument can be made that [REDACTED] is bound by its terms because [REDACTED] subsequently ratified [REDACTED]'s act.

The evidence appears clear that following the submission of the consent to extend, the Commissioner sought from the Taxpayers a power of attorney authorizing [REDACTED] to represent the Taxpayers before the Commissioner for the taxable year [REDACTED]. The Commissioner's files reflect that the requested power of attorney was secured from the Taxpayers on or about [REDACTED]. In addition, the evidence establishes that [REDACTED] met with both [REDACTED] and [REDACTED] and secured their consent prior to agreeing to the relevant Revenue Agent's Report [Form 4549] on behalf of the Taxpayers. Arguably, [REDACTED]'s subsequent grant of the power of attorney and authorization to accept the Commissioner's determination were acts consistent with approval or validation of [REDACTED]'s execution of the consent. Therefore, it is Counsel's opinion that [REDACTED]'s objective acts operated as a ratification of the consent.

Arguably, [REDACTED]'s inaction in the immediate case also operates as a ratification since it was incumbent upon him to repudiate [REDACTED]'s representation as soon as he learned of it, if in fact [REDACTED] had not authorized it in the first place. See Kraasch v. Commissioner, supra at 628-629; Lyon v. Commissioner, supra at 227; Ryan v. Commissioner, supra at 1804; Lefebvre v. Commissioner, supra at 1575-1576. Even if [REDACTED] was unaware of the status of the examination or the consequences of [REDACTED] representing [REDACTED] before the Commissioner, this would not absolve him of the responsibility for the acts of [REDACTED]. Id. The ultimate responsibility for [REDACTED]'s tax matters rests with [REDACTED], who had the duty to disaffirm any unauthorized acts undertaken by [REDACTED]. Id.

CONCLUSION

Based upon the preceding, it is Counsel's opinion that [REDACTED] had the actual authority to execute both the 1) consent to extend the statute of limitation and the 2) consent to assessment on behalf of [REDACTED]. Because no additional guidance has been sought in the immediate case, Counsel will be closing its file on this matter at this time. However, in the event any additional assistance is needed, please feel free to contact our office.

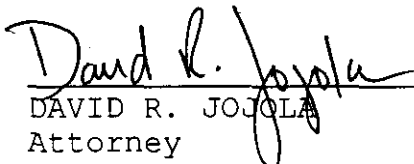
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